IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 878 of 1989

with

FIRST APPEAL No 879 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA
and
Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

DADUBHAI AND DAUGHTERS FAMILY TRUST

Appearance:

1. First Appeal No. 878 of 1989
Mr. Umesh A. Trivedi, AGP for Petitioner
MR MG NAGARKAR for Respondent No. 1

2. First AppealNo 879 of 1989
Mr.Umesh A. Trivedi, AGP for Petitioner
MR MG NAGARKAR for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA
and
MR.JUSTICE H.K.RATHOD

Date of decision: 17/06/2000

ORAL JUDGEMENT

[Per D.C.Srivastava,J.]

These two connected appeals are proposed to be disposed of by a common judgment.

Brief facts giving rise to these appeals are as under:

The disputes having arisen between the contractor - respondent and the State of Gujarat-appellant, the contractor referred the same for arbitration acting upon clause 52 of the Arbitration Agreement. Compliance of clause 51 of the Arbitration Agreement was also made by the Contractor but with no result.

The arbitrator entered upon the reference; issued notice of reference to the appellant-State of Gujarat. The notice was served on the appellant but nobody appeared from the side of the appellant before the arbitrator. In these circumstances, the arbitrator was left with no option but to proceed ex parte. After considering the material placed before the arbitrator by the contractor-respondent, the arbitrator gave award and also awarded interest at the rate of 15 % per annum from the date of the reference till the filing of the award.

After the award was rendered by the arbitrator, he gave application under section 14 of the old Arbitration Act for making the award rule of the Court which was registered by the Court below as Civil Miscellaneous Application No. 247 of 1987. Notice of this motion of the arbitrator was issued by the Court below. The appellant State of Gujarat instead of filing objections praying for setting aside the award under section 30 of the Arbitration Act, had chosen to file separate application for setting aside the award which was numbered as Civil Miscellaneous Application NO. 256 of 1987. Though not required, the arbitrator also filed objections and the contractor filed objections to the objections filed by the appellant numbered as civil miscellaneous application No.256 of 1987.

Four objections were raised by the appellant before the Court below. The first was that the arbitrator was not appointed in accordance with law nor was he appointed in accordance with the arbitration agreement especially in view of clauses 51 and 52 of the agreement between the parties and, as such, he had no jurisdiction to enter upon the reference and give award against the appellant. The second objection was that the award was ex parte and adequate opportunity was not given by the arbitrator which amounts to misconduct of the arbitrator. Of course, no personal misconduct of the arbitrator was alleged. It was alleged that it was the misconduct of the arbitrator with the proceedings in rendering ex parte award. The third objection was that the arbitrator could not have introduced personal knowledge while giving award. The last was that the Arbitrator could not have awarded interest.

All the four objections were considered by the Court below. The court below was of the opinion that the arbitrator was appointed in accordance with clause 52 of the Arbitration Agreement and, as such, he had jurisdiction to enter upon the reference on the motion of the contractor. It also found that since the notice was served on the appellant and since the appellant did not appear before the arbitrator, the arbitrator was justified in proceeding ex parte and giving ex parte award. On the third point, no material could be placed before the Court below nor before us that any personal knowledge was introduced while rendering the award. The fourth objection was upheld by the Court below that the arbitrator could not have awarded interest.

We have heard Shri U. A. Trivedi, learned Asstt.G.P. on behalf of the appellant and Shri M.G. Nagarkar for the respondent No. 1. Respondent No. 2 has not appeared despite service of notice. We have also examined the record as well as the impugned judgment. Shri Trivedi could not show us from the record that any personal knowledge of the arbitrator was introduced while rendering award or that the arbitrator was influenced by the personal knowledge about the disputes and differences between the parties. Consequently, this cannot be a ground for holding that the arbitrator was guilty of personal misconduct nor it can be said that the arbitrator was biased while giving the award inasmuch as he was influenced by his personal knowledge in the disputes pending before him for adjudication. This point was not seriously pressed before us nor it could be

substantiated. Hence, we are unable to uphold that the arbitrator was guilty of personal misconduct.

The next point for consideration is whether the award suffers from the vice of procedural misconduct inasmuch as it was an ex parte award. The Court below has rightly held that on the facts and circumstances of the case, the arbitrator was justified in proceeding ex parte and rendering an ex parte award. It is undisputed that the arbitrator, after receipt of the reference, issued notice to the appellant-State of Gujarat. Shri Trivedi had to admit that the notice issued by the arbitrator was received by the appellant. It is equally admitted by Shri Trivedi that despite service of notice, nobody appeared before the arbitrator to oppose the reference or appointment of the arbitrator or to contest the reference. In these circumstances, the arbitrator was left with no option but to proceed ex parte. Shri Trivedi has brought to our notice certain correspondence and letters sent by the State Government to the arbitrator. However, the arbitrator is not a Court of Law who is bound by all the provisions of the Code of Civil Procedure. The arbitrator can chose his own procedure for deciding the reference. The arbitrator is not bound to observe strict technical rules for service of notice and for deciding the case in accordance with the procedure prescribed in the Code of Civil Procedure for decision of the civil suits. It was not necessary for the arbitrator to fix date for settlement of issues and then to pass an order for proceeding ex parte on the date of first hearing namely on the date of settlement of issues. The arbitrator was fully justified in not taking cognizance of the letters sent by the appellant intimating that the appointment of the arbitrator was not proper. If the appellant felt that the appointment of the arbitrator was not proper and not in accordance with the arbitration agreement, it could have approached the competent court under section 5 of the Arbitration Act.

Section 5 of the Arbitration Act, 1940 provides that the authority to appoint the arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement. Admittedly, no leave of the Court was obtained by the appellant for revocation of the authority of the arbitrator appointed by the contractor after due compliance of clauses 51 and 52 of the arbitration agreement.

We have also carefully examined these two clauses of the arbitration agreement and we are unable to find

any contrary intention expressed in the arbitration agreement that unilateral revocation of the authority of the arbitrator could be made by the appellant. Since recourse to section 5 of the Arbitration Act was not taken by the appellant, authority of the arbitrator could not be ignored or challenged just by dropping one or two letters to the arbitrator. In these circumstances, the arbitrator was justified in proceeding ex parte. The ex parte award, in such circumstances, cannot be said to be the result of misconduct on the part or the arbitrator with the proceedings pending before him.

The Orissa High Court in P.S.Oberoi versus The Orissa Forest Corporation Ltd., AIR 1982 Orissa 168, had an occasion to discuss similar situation. It was of the view that though there is no statutory rule that if the arbitrator proceeds ex parte without giving notice of his intention to proceed in that manner, the award made by him must be set aside. However, in absence of such inflexible statutory provision, the Orissa High Court was of the view that the issuance of notice is the rule of prudence and convenience. Rule of prudence in the case before us was followed by the arbitrator. The Orissa High Court further proceeded to observe that if either party after the arbitrator has given him sufficient notice and proper opportunities of attending, did not appear, the arbitrator may proceed in his absence. If the arbitrator so proceeded, it cannot be said that any prejudice was caused to the party who did not appear despite service of notice. It was not necessary for the arbitrator to give any warning in the notice that if the other party does not appear, the matter will be heard and decided ex parte. This is obviously for the reason that the arbitrator is not bound by the strict rules of procedure and forms of notice prescribed under the Code of Civil Procedure. Under these circumstances, if the State of Gujarat did not intend to appear before the arbitrator and the arbitrator rendered ex parte award, the said award cannot be set aside nor it can be said that there was any judicial misconduct on the part of the arbitrator. Thus, on this ground also, the award could not be set aside.

The last ground is that the appointment of the arbitrator was not in accordance with and in compliance of clauses 51 and 52 of the arbitration agreement between the parties and, as such, the arbitrator had no jurisdiction to enter upon the reference and render the award. This contention and objection from the side of the appellant State of Gujarat goes to the root of the matter because if the appointment of the arbitrator is

not found in accordance with law or in accordance with the arbitration agreement between the parties, certainly, the arbitrator had no jurisdiction to enter upon the reference hence the award will be rendered without jurisdiction and the effect of such award will be treated as nullity and will be liable to be set aside. For appreciating this contention, we have examined the record as well as clauses 51 and 52 of the arbitration agreement between the parties.

There is no dispute that the agreement between the parties was signed on behalf of the State of Gujarat by competent authority and also by the contractor respondent. Shri Trivedi has contended that since the contractor did not make due compliance of section 51 of the agreement between the parties, he could not have unilaterally appointed the arbitrator and referred the dispute or disputes to the arbitrator. We have examined clause 51 of the arbitration agreement which is quoted as under:

"51. STATEMENT OF DISPUTES :

If the contractor considers any work demanded by him to be out side the requirements of the contract or considers any drawings, record or rusing of the department on any matter in connection with or arising out of the conduct or the carrying out of work to be unacceptable, he shall promptly ask the Executive Engineer in writing, for written instructions or decision. Thereupon, the Executive Engineer shall give his written instructions or decision within a period of thirty days of such receipt.

Upon receipt of the written instructions or decision, the Contractor shall promptly proceed without delay to comply with such instructions or decision.

If the Executive Engineer fails to give his instructions or decision in writing within a period of thirty days after being requested or if the contractor is dissatisfied with the instructions or decision of the Executive Engineer, the Contractor may within thirty days after receiving the instructions or decision appeal to Superintending Engineer, who shall afford an opportunity to the Contractor to be heard and to offer evidence in support of his appeal. This Officer shall give a decision

within a period of sixty days after the Contractor has given the said evidence in support of his appeal.

If the Contractor is dissatisfied with this decision, the Contractor, within a period of thirty days from receipt of the decision, shall indicate to refer the dispute to arbitration, failing which, the said decision shall be final and conclusive. "

From plain reading of the above clause 51 of the agreement between the parties, it is clear that if the Contractor considers that any work demanded of him to be out side the requirement of contract etc. is unacceptable to him, he shall promptly ask the Executive Engineer in writing for written instructions or decision. Once such written request is made to the Executive Engineer for his instructions or decision, the Executive Engineer shall give his written instructions or decision within a period of thirty days of such receipt. The word "shall" in first part of clause 51 of the arbitration agreement makes it obligatory and mandatory for the Executive Engineer to give his instructions or decision to the Contractor within thirty days of the receipt of written request from the Contractor. From the record, learned counsel Shri Nagarkar has pointed out that request was made to the Executive Engineer in writing but during the period of thirty days, no instruction or decision was given by him to the respondent. The matter seems to be lying in the cold storage.

The second part of clause 51 of the agreement between the parties provides that if the Executive Engineer fails to give his instructions or decision in writing within a period of thirty days after being requested, of if the contractor is dissatisfied with the instructions or decision of the Executive Engineer, the Contractor may within thirty days appeal to the Superintending Engineer who, after affording opportunity to the Contractor of hearing and producing evidence shall give decision within a period of sixty days after the Contractor has given evidence in support of his appeal.

The contention of Shri Trivedi has been that this was also not complied with because the contractor did not place the entire material before the Superintending Engineer as a result of which the appellant was prevented from putting its defence properly before the Superintending Engineer. From the record, it appears that on 4.3.1989, the contractor Respondent submitted his

claim to the Superintending Engineer. It is argued by Shri Nagarkar that the Executive Engineer has not given any decision on the written request of the contractor. Consequently, the Contractor respondent under clause 51 of the agreement was entitled to approach the Superintending Engineer. The Superintending Engineer gave hearing to the Contractor on 23.3.1987. No decision has been given by the Superintending Engineer during the period of sixty days. Consequently on 24th May, 1987, the Contractor gave letter Exh. 93 to the Chief Engineer intimating the names of three persons to be selected for appointment of arbitrator. The Chief Engineer did not indicate his choice out of the three names suggested by the Contractor. Consequently, the Contractor had chosen to select Shri V. D. Patel as a sole arbitrator. ON these facts and circumstances, it can safely be said that even the last paragraph of clause 51 of the agreement was fully complied with by the respondent contractor. Since no decision was given by the Superintending Engineer within sixty days, the contractor had no option but to indicate his choice of referring the dispute to the arbitrator. Since no decision has been given by the Superintending Engineer,it cannot be said that any decision against the Contractor has become final. Since no decision has been given by the Superintending Engineer in favour of the contractor, the appellant cannot be heard contending that adequate opportunity of hearing was not afforded by the Superintending Engineer. The violation of principles of natural justice complained of by Shri Trivedi in these circumstances cannot be appreciated.

Then comes clause 52 of the arbitration agreement. Obviously, clause 52 provides that all the disputes or differences in respect of which decision has not been final and conclusive shall be referred for arbitration as follows:

"Within thirty days of receipt of notice from the contractor of his intention to refer the dispute to arbitration the Chief Engineer Irrigation Project shall send to the contractor a list of three officers of the rank of Superintending Engineer or higher, who have not been connected with the work under this contract. The contractor shall within fifteen days of receipt of this list select and communicate to the Chief Engineer the name of one officer from the list who shall then be appointed as the sole arbitrator. If contractor fails to communicate his selection of name, within the stipulated

period, the Chief Engineer shall without delay select one officer from the list and appoint him as the sole arbitrator. If the Chief Engineer fails to send such a list within thirty days, as stipulated, the Contractor shall send a similar list to the Chief Engineer within thirty days. The Chief Engineer shall then select one officer from the list and appoint him as the sole arbitrator within thirty days. If the Chief Engineer fails to do so, the Contractor shall communicate to the Chief Engineer the name of one officer from the list, who shall then be the sole arbitrator.

The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The decision of the arbitrator shall be final and binding on the parties there to. The arbitrator shall determine the amount of costs of arbitration to be awarded to either parties.

Performance under the contract shall continue during the arbitration proceedings and any payments due to contractor shall not be withheld unless they are the subject matter of the arbitration proceedings.

All awards shall be in writing and in case if awards amounting to Rs.12.00 lakh and above, such awards shall state the reasons for the amount awarded.

Neither party is entitled to bring a claim to arbitration if the arbitrator has not been appointed before the expiration of thirty days after defect liability period. "

The opening words of clause 52 therefore make it clear that all the disputes and differences in respect of which decision of the Superintending Engineer or Executive Engineer has not become final and conclusive shall be referred for arbitration. Second paragraph of clause 52 provides that within thirty days of receipt of notice from the contractor of his intention to refer the dispute to arbitration, the Chief Engineer Irrigation Project shall send to the contractor a list of three officers of the rank of Superintending Engineer or higher, who have not been connected with the work under this contract. The request of the contractor in the instant case was made to the Chief Engineer (Irrigation)

through Exh. 93 on 24.3.1987. The Chief Engineer did not select any of the three names nor communicated to the contractor that these names were not acceptable, rather, an attitude of silence was adopted by the Chief Engineer. The Contractor was, therefore, left with no option but to appoint the sole arbitrator of his choice. The Chief Engineer didnot send his own list of three officers to be appointed as arbitrator. Consequently, the contractor had no chance to make selection out of the officers proposed and suggested by the Chief Engineer. As such, the second consequence in second paragraph of clause 52 obviously followed which provides that if the Chief Engineer fails to do so, the Contractor shall communicate to the Chief Engineer the name of one officer from the list who shall then be the sole arbitrator. Thus, it cannot be said that there was no compliance of clause 51 and 52 of the Arbitration Agreement. On the other hand, effective compliance of these two clauses was made by the contractor and after due compliance, he was entitled to appoint the sole arbitrator. The arbitrator so appointed by the contractor therefore cannot be said to be either contrary to the arbitration agreement or contrary to law. As such, the arbitrator acquired jurisdiction to enter upon the reference and render the award. The impugned award, therefore, cannot be set aside on this ground.

On the objection of award of interest by the arbitrator, the lower court has already accepted the same and gave finding in favour of the appellant which was not challenged by Shri Nagarkar in the course of argument in this appeal. The appellant should therefore feel satisfied with the modified award which was modified by the lower court and was thereafter made rule of the Court.

No other point was pressed before us. We do not find any merit in these appeals. Both the appeals are accordingly dismissed with no order as to cost.

19.6.2000 (D.C.Srivastava,J.)

(H.K.Rathod,J.)

Vyas